

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DWAYNE NORTON,) No. C 07-1577 RMW (PR)
)
 Plaintiff,)
) ORDER GRANTING
 v.) DEFENDANTS' MOTION TO
) DISMISS; DENYING
) DEFENDANTS' MOTION TO
 CONTRA COSTA COUNTY SHERIFF'S) CHANGE TIME FOR FILING OF
 DEPT., et al.,) DISPOSITIVE MOTION AS MOOT
)
 Defendants.) (Docket Nos. 11, 18)

Plaintiff, proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. The court ordered service on the defendants. Defendants filed a motion to dismiss the complaint based on plaintiff's failure to exhaust state remedies. Plaintiff did not file an opposition. Having reviewed the pleadings, the court GRANTS defendants' motion to dismiss and dismisses this action without prejudice for failure to exhaust his administrative remedies. The court also DENIES as moot defendants' motion to change the time for filing a dispositive motion.

DISCUSSION

1. Standard of Review

Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense; defendants have the burden of raising and proving the absence of exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108,

1 1119 (9th Cir. 2003). A nonexhaustion claim should be raised in an unenumerated Rule 12(b)
 2 motion rather than in a motion for summary judgment. Id. In deciding a motion to dismiss for
 3 failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide
 4 disputed issues of fact. Id. at 1119-20.¹ If the court concludes that the prisoner has not
 5 exhausted nonjudicial remedies, the proper remedy is dismissal without prejudice. Id. at 1120.

6 2. Analysis

7 The Prison Litigation Reform Act ("PLRA") of 1995 amended 42 U.S.C. § 1997e to
 8 provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C.
 9 § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
 10 facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
 11 Exhaustion is mandatory and not left to the discretion of the district court. Woodford v. Ngo,
 12 126 S. Ct. 2378, 2382 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)). Exhaustion is
 13 a prerequisite to all prisoner lawsuits concerning prison life, whether such actions involve
 14 general conditions or particular episodes, whether they allege excessive force or some other
 15 wrong, and even if they seek relief not available in grievance proceedings, such as money
 16 damages. Porter v. Nussle, 122 S. Ct. 983, 988, 992 (2002).

17 Here, defendants correctly raise nonexhaustion in an unenumerated motion to dismiss.
 18 Defendants submit a declaration in support of their position that plaintiff failed to utilize any of
 19 the Sheriff's Department's grievance procedures, see Defendants' Motion, p. 9 and Declaration,
 20 p.2. Further, defendants have no record of any administrative grievance filed by plaintiff during
 21 the time he was housed in their facility from May 4, 2004 through May 24, 2005, see
 22 Declaration, p. 3-4. Therefore, defendants argue that plaintiff has failed to exhaust
 23 administrative remedies. Plaintiff has filed no opposition.

24 Section 1997e(a) requires that plaintiff must exhaust all administrative remedies before
 25 _____

26 ¹ If the court looks beyond the pleadings in deciding an unenumerated motion to dismiss
 27 for failure to exhaust -- a procedure closely analogous to summary judgment -- the court must
 28 give the prisoner fair notice of his opportunity to develop a record. Wyatt, 315 F.3d at 1120
 n.14. Plaintiff was given such notice in the October 18, 2007 order in this matter.

1 raising the claim in a § 1983 complaint in federal court. See Woodford v. Ngo, 548 U.S. 81, 88
2 (2006) (“Exhaustion gives an agency an opportunity to correct its own mistakes with respect to
3 the programs it administers before it is haled into federal court, and it discourages disregard of
4 [the agency’s] procedures.”) (internal quotations omitted). As it is clear from defendants’
5 motion and exhibits that plaintiff has not completed any level of administrative review available
6 to him, and there is no applicable exception to the exhaustion requirement, dismissal without
7 prejudice is appropriate.²

8 Accordingly, the court GRANTS defendants’ motion to dismiss for failure to exhaust
9 (docket no. 11). The court further DENIES defendants’ motion to change the time for filing a
10 dispositive motion as moot (docket no. 18). This case is DISMISSED without prejudice to
11 plaintiff’s refiling his claim after all available administrative remedies have been exhausted.

12 The Clerk shall close the file.

13 IT IS SO ORDERED.

14 DATED: 9/10/08



RONALD M. WHYTE
United States District Judge

26 _____
27 ² In light of this conclusion, the court finds it unnecessary to address defendants’ argument
28 that defendant Contra Costa County Sheriff’s Department should be dismissed because plaintiff
failed to state a claim against it.